In the Supreme Court of the United States,

OCTOBER TERM, 1897.

No. 415.

BENJAMIN W. HAWKER,
Plaintiff in Error,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Defendant in Error.

STATEMENT.

This is an appeal from a judgment of the Court of Appeals of the State of New York, entered March 16th, 1897, reversing a judgment of the Appellate Division of the Supreme Court for the First Department, entered February 10, 1897, which last judgment had reversed a judgment of the Court of General Sessions entered September 17, 1896.

The defendant was convicted under section 153 of the Public Health Law (chap. 661, Laws 1893, as amended by chap. 398, Laws 1895) for the misdemeanor of **practicing medicine after conviction of a felony.**

This prosecution has been brought upon the complaint of the Medical Society of the County of New York under the provisions of section 153 of the

Public Health Law, by which the medical societies of the different counties are made *ex-officio* complainants in cases of this character.

It is and has been for some years the policy of the New York law to **deny to felons** the right to practice medicine; and if a felon does practice, he is amenable to punishment for a misdemeanor.

In **March, 1878,** defendant had been convicted of a felony—abortion.

In **February, 1896,** he practiced medicine in the City and County of New York.

In **April, 1896,** he was indicted for the practice of medicine last named.

The defendant demurred to the indictment upon the grounds—

(1) That the statute was **not retrospective** and did not extend to felonies committed before its passage, or—

(2) That if it was retrospective, then it was **ex post facto** as to him, and void.

The demurrer was afterward overruled and the defendant was convicted upon September 17, 1896, and fined $250. He thereupon appealed from the judgment and from the decision overruling the demurrer.

No facts whatever are in dispute. The appeal turns wholly upon **questions of law.**

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POINT I.

As to defendant's claim that the statute is only prospective in its operation.

The defendant claims that it was not the intention of the Medical Law in the State of New York to apply to persons who had been convicted of felony **before its passage.**

The most effective answer to this claim is that the defendant's own attorney apparently places but little faith in it. He urges it, apparently to save the point; but soon passes over to his main contention.

The words of the law are, however, too plain to admit of any refined construction.

> "**Any person** * * * **who, after conviction of a felony,** shall attempt to practice medicine, or shall so practice * * * shall be guilty of a misdemeanor. * * *"
>
> L. 1895, chap. 398, amending L. 1893, chap. 661, sec. 153.

Apart from the clear meaning of these words, the policy of the law to exclude all persons convicted of felony is shown by another section of the present Medical Law (L 1893, chap. 661, sec. 140):

> "Nor shall **any person** practice medicine who has **ever been convicted of a felony by any court,** or whose authority to practice is suspended or revoked by the regents on recommendation of a state board."

The Courts below held that the statute was retrospective in its operation so as to prevent practice by felons who had been convicted before passage of this Act. Their arguments leave no doubt as to this branch of the case.

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In the Appellate Division of the New York Supreme Court no discussion whatever was made on this point. In the Court of Appeals it was argued at length that it was the clear legislative intention to prohibit the practice of medicine by any person who, previous to the passage of the Law, had been convicted of felony.

See Opinion, Haight, J., 152, N. Y., at p. 239.

Thus it is obvious that the present Medical Law plainly forbids practice by felons. In section 140 it plainly says that they shall not practice, and in section 153 it adds a penalty for such practice by declaring the practitioner to be guilty of a misdemeanor.

It might be argued that the Legislature had no constitutional **power** to deny to a man who had been already convicted, the right to practice medicine; but it is plain that it was **its clear intention so to do.**

POINT II.

The general scope of the argument outlined.

It may be succinctly stated that the dispute between the respective parties to this controversy is as follows:

The defendant, upon his part, claims that his conviction under the act in question would **add a new punishment**—viz., the deprivation of his right to practice medicine—to the punishment already suffered by him for the felony which he committed. He, therefore, claims the law is **unconstitutional,** either as *ex post facto* or as in the nature of a bill of attainder.

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The People, upon the other hand, claim that the only question involved is that of the **admitted power of the State to regulate the practice of medicine.** They claim that the exclusion of Hawker, as an unfit person, whose bad character has been adjudicated by a conviction of felony, is plainly within the **reserved police power** of the State.

In connection with this contention they further claim that if Hawker, the defendant, is deprived of the privilege of practicing medicine under the New York Statute, his position is exactly like the position of any person upon whom a public health law operates. He must yield, in view of the greater benefit to be gained by the public at large. His personal inconvenience is a mere incident, and **the purpose of the legislation was in no wise to punish him; and, therefore,** in no sense *ex post facto.*

POINT III.

The police power extends to the protection of the public health, and comprises the regulation of the practice of medicine.

That the police power extends to the protection of the **public health** is elementary.

> Am. and Eng. Ency. of Law, vol. 18, p. 748 and cases cited.

As a corollary of this the State has the right to pass laws regulating **the practice of medicine.**

> Am. and Eng. Enc. of Law, vol. 18, p. 748.

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Citing—

Orr *vs.* Meek, 111 Ind., 40.
Dent *vs.* W. Va., 129 U. S., 114.
Eastman *vs.* State, 109 Ind., 278.
Richardson *vs.* State, 47 Ark., 572.

There is no dispute about these general propositions. The only question is as to their **application** to the peculiar facts of the case at bar.

The People contend that they necessarily give to the State the right to determine who, **in point of character,** is a fit person to be permitted to practice; and that in the proper exercise of this right the State has the power to exclude from practice **any person whose character is admittedly or adjudicatedly bad.**

POINT IV.

The cardinal cases on both sides at once reviewed.

The defendant bases his entire argument upon the **alleged deprivation** of his right to practice, and claims that this so called deprivation was a **new punishment.**

In support of this view he cites the celebrated "test-oath" cases of **Cummings** and **Garland,** and relies almost entirely upon them.

The People, upon their part, claim that these cases have no bearing upon the issues, and to substantiate this adduce the **Dent** case (129 U. S., 114). In that case the Court held that the State of West Virginia had the right, in the exercise of its admitted police power, to exclude a doctor and **stop his actual practice** because he did not come up to new **educational requirements exacted by the State.**

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Here it is claimed that, in the exercise of the same police power, the State of New York, has the power to exclude Hawker because he does not come up to the **moral character requirement** exacted by the State.

These cases are of such vital importance that they are quoted at length, particular attention being given to make the quotations accurate.

Cummings vs. State of Missouri, 4 Wall 277

Cummings, a Roman Catholic clergyman, at the close of the war could not take **a test oath** to the effect that he had not sympathized with the South during the Rebellion. The Constitution of Missouri denied to those who could not take the test oath the right to follow any profession, and Cummings was prosecuted for misdemeanor for pursuing his pro fession—namely, that of a clergyman—not having taken the test oath. His claim was that the Constitution, as far as it imposed such a test oath, was unconstitutional and void.

The Court held that the oath was *void*, stating its reasons as follows:

Per Field, *J.:*

1. The test oath was retrospective and embraced all **the past** (p. 318).

2. The question is not as to the existence of the police power, **but whether that power has been made an instrument for the infliction of punishment** (p. 319).

3. Qualifications relate to the fitness or capacity of the party for a particular pursuit or profession (p. 319).

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4. The alleged qualification **"bore no possible relation"** to Cummings' fitness for his profession (p. 319).

5. The disability created constituted punishment (p. 320).

6. The deprivation of any rights, civil or political, may be punishment, the circumstances attending and the causes of the deprivation determining this fact (p. 320).

7. The test oath was aimed **at past acts, and not future acts** (p. 327).

Ex parte Garland, 4 Wall, 333.

This case is exactly similar to the case of Cummings, and also related to **a test oath,** and only differed in the circumstances that the defendant was an attorney in the United States Courts, and the law in question was an act of Congress.

Per Field, *J.*:

1. The clauses of the test oath "all relate to **past acts"** (p. 376).

2. The statute is directed against parties who **have offended** (p. 377).

3. Its object is to exclude them from the practice of the law in the United States Courts (p. 377).

4. The profession of an attorney and counselor is not like an office created by an act of Congress, which depends for its continuance, its powers and its emoluments upon the will of its creator (p. 378).

5. The attorney is not an officer of the United States, but of the Court (p. 378).

6. The pardon blotted out his guilt (pp. 380–1).

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It is of the utmost interest to note that in both of these cases the Supreme Court decided by a five to four vote—a bare majority of one. The Court seems to have leaned strongly toward the view that the States possessed reserved rights to regulate these professions; but the hardship of each case seems to have resulted in a decision adverse to the State. Both cases proceeded upon the principle that a test oath **for past conduct** alone could in no wise be considered the imposition of a valid qualification within the power of the State to impose; and that it must be regarded solely **as punishment for past conduct**.

Twenty years later, when the passions aroused by the war had died away, similar questions arose again in the Dent case, 129 U. S., 114.

Dent vs. State of W. Va., 129 U. S., 114:

In that case the State of West Virginia passed a law requiring all practitioners of medicine either (1) to possess a certain diploma, or (2) to have actually practiced ten years. Dent, who had no diploma and who had actually practiced **only five years,** was convicted of a misdemeanor for so practicing after the passage of the act.

We present the salient features of this case in the belief that it is **directly decisive** of the case before the Court.

The Supreme Court approached the question squarely, holding as follows:

Per FIELD, *J.:*

1. (Defendant **claims**) "the denial of the right to practice his profession without the certificate required constituted the deprivation of his

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vested right and estate in his profession, which he had previously acquired (p. 121).

2. Freedom to follow professions, etc., laid down (p. 121).

3. But there is **no arbitrary deprivation** of such right where its exercise is not permitted because of **a failure to comply with conditions imposed by the State for the protection of society.** The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of **ignorance or incapacity as well as of deception and fraud** (p. 122).

4. The nature and extent of the qualifications required must depend primarily **upon the judgment of the State** as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. **It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation** (p. 122).

5. Due consideration therefore, for the protection of society may well induce the State to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified. The same reasons which control in imposing conditions, upon compliance with which the physician is allowed to practice in the first instance, **may call for further conditions** (p. 123).

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6. We perceive **nothing** in the statute **which indicates an intention** of the Legislature **to deprive one of any of his rights. No one has a right to practice medicine** without having the necessary qualifications of learning and skill; and the statute only requires that whoever assumes, by offering to the community his services as a physician, that he possesses such learning and skill (p. 123).

7. The cases of Cummings *vs.* The State of Missouri, 4 Wall, 277, and of *ex porte* Garland, 4 Wall, 333, upon which such reliance is placed, do not, in our judgment, support the contention of the plaintiff in error (setting out both cases at length). There is nothing in these decisions which supports the positions for which the plaintiff in error contends. They only determine, that one who is in the enjoyment of a right to preach and teach the Christian religion as a priest of a regular church, and one who has been admitted to practice the profession of the law, cannot be deprived of the right to continue in the exercise of their respective professions by the exaction from them of an oath as to their past conduct, respecting matters which have no connection with such professions. **Between this doctrine and that for which the plaintiff in error contends there is no analogy or resemblance.** The Constitution of Missouri and the act of Congress in question in those cases were designed to deprive parties of their right to continue in their professions for past acts or past expressions of desires and sympathies, many of which had no bearing upon their fitness to continue in their profession. **The law of West Virginia was intended to secure such**

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> **skill and learning in the profession of medicine that the community might trust with confidence those receiving a license under authority of the State** (pp. 125, 128).

The object of setting these three cases out so fully is to bring plainly before the Court the true principle which underlies them: **The State has a right to regulate, but not to impose arbitrary qualifications under the name of regulations.**

Such an arbitrary qualification having no relation to the profession would be pure and simple punishment.

If it had a valid relation to the profession the professional man would have to bow to it.

Under the circumstances, then, the broad question which it is the object of this brief to discuss, is now brought into prominence. It amounts to this: **Is good moral character a just and proper qualification to require of a physician? A** large portion of this brief will be devoted to showing how good moral character is made a requisite in a physician both by the laws of New York and also by the laws of dozens of other States.

The obvious purpose will be to show that good, moral character **has always been, and now is, a qualification** of physicians generally recognized and enforced.

This will bring the proposition directly into line with the case of Dent *vs.* West Virginia, just recited, and effectually determine the constitutionality of the New York statute in relation to the defendant Hawker.

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POINT V.

Historical View of the regulation of the practice of medicine in New York.

As the fundamental question in this case turns upon the right of the State of New York to regulate the practice of medicine, it is important to note that **the State has undertaken to regulate this practice from the earliest times.**

In Board of Excise *vs.* Barrie, 34 N. Y., 662, the Court said with regard to excise laws:

> "These appeals challenge legislative authority exercised since the origin of the government. At no time in the history of the State have we been without excise laws, nor has the authority of the Legislature to control, regulate, or prohibit the sale of spirituous and intoxicating liquors ever been questioned."

The same remark, *mutatis mutandis*, might be made as to medical legislation, and we present a skeleton resume of the various acts by which the Legislature has controlled the practice for 140 years.

Before 1806.

Chapter CXCVIII., Laws 1760, applying only to the City of New York, superseded by chapter XXXVIII., Laws 1792. In 1797 the first general regulation of medicine throughout the State was passed, known as chapter XLV., Laws 1797, succeeded by chapter CXXXVII., Laws 1801, requiring all persons to register with the County Clerk.

Between 1806 and 1844.

By chapter CXXXVIII., Laws 1806, an entirely new departure was made and medical societies were created

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"for the purpose of regulating the practice of physic and surgery in this State."

With slight amendments this law was adopted in the Revised Laws of 1813, and afterward in the Revised Statutes of 1830.

From 1844 to 1874.

By chapter 275, Laws 1844, every regulation of medicine was abrogated, and for thirty years practitioners were practically free from any regulation whatever.

From 1874 to date.

These statutes regulating the practice of medicine were re-enacted and altered from time to time, until the present condition of affairs was reached.

These statutes were: Chapter 436, Laws 1874; Chapter 513, Laws 1880; Chapter 647, Laws 1887; Chapter 661, Laws 1893, which last-mentioned law is the present "Public Health Law."

Chapter 398, Laws 1895, which amended section 153 of the "Public Health Law," is the act under which this defendant is prosecuted.

POINT VI.

Good moral character requirement in New York.

The specific object of this topic is to trace the gradual development of the present system which embodies the necessity for **good moral character** in practitioners.

Before the year 1890 any person who either had a diploma from any chartered medical school or State Board of Examiners or Medical Society was, in effect, licensed to practise medicine in the State of New York.

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Under chapter 513 of the Laws of 1880, the degree of doctor of medicine legally conferred by any incorporated medical college in New York was declared to be a license to practice after the holder had registered it.

Under this same chapter the holder, if coming to the State **from without the State,** was obliged to get his diploma indorsed by the faculty of some incorporated medical college or medical school of this State, after which indorsement it became as much a license as if it had been issued by the school indorsing it.

See chap. 513, L. 1880, sec. 4.

Here we see the first requirement of good moral character; for an outsider coming to this State before he could get his diploma indorsed, was obliged to exhibit

" satisfactory evidence of his good moral character."

The inference is that the State regarded graduates of its own chartered medical schools as of sufficiently good moral character without other proof.

This condition of affairs continued substantially unchanged until 1890, when the radical change which gives to the present system its character, was inaugurated by chapters 500 and 507, Laws 1890.

By chapter 500, Laws 1890, the Regents of the University of the State of New York, who are a governmental organization, were granted the right to indorse foreign diplomas.

By the second act, chapter 507, Laws 1890, "An Act to establish Boards of Medical Examiners," the Regents of the University were made the sole source from which licenses could for the future issue.

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The new and comprehensive system which came into effect, as a result of this act, was to take effect upon September 1, 1891, and had the effect of compelling candidates desirous to become practitioners of medicine to stand a State examination before State examiners, upon the successful passage of which examination the candidate would receive a license from the Regents to practise medicine.

One of the requirements of any person who comes up for examination is that he shall be

"of good moral character."

(See ch. 507, L. 1890, sec. 8.)

These provisions of this Law of 1890 were carried into the present Public Health Law, chapter 661, Laws of 1893; and as far as they required an applicant for license to practise medicine to be **"of good moral character"** they are preserved in the present act which regulates the licensing of medical practitioners.

So far none of the express requirements of good moral character had been made by the Legislature to relate in any way to **existing practitioners.** As far as the State has attempted to deny to those who are not of good moral character any existing privilege to practice medicine its regulations are as follows:

By laws of 1887, chapter 647, section 6, no person who had been convicted of a felony could be licensed, and if any person who was duly licensed should be convicted of a felony his license should be revoked and his practice of medicine thereafter would be a misdemeanor.

This provision was substantially embodied in the revision of 1893, chapter 661, Laws 1893, and was preserved in the present law, chapter 398, Laws 1895.

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This last named section is the one under which the prosecution in this case has been brought.

Thus in New York candidates are required not only to pass through medical schools, whose standards are carefully arranged, but likewise to pass the State examination; and before they can stand this State examination they are required to exhibit to the Regent satisfactory evidence of their **good moral character.**

It may also be added that under the present medical law, chapter 661, Laws 1893, section 140, the right is reserved to the Regents of the University to revoke the license of any person upon the recommendation of a State Board of Medical Examiners.

By all these various provisions **good moral character is made a salient requirement.**

Had such legislation stopped at the point of merely requiring **future applicants** to be of good moral character, it is obvious that the requirement would only have been partial.

No such reproach, however, can attach to the law of New York.

By the provisions of Laws 1887 and Laws 1893, as cited above, the authority of the State to practice medicine was thenceforward intended to be withdrawn from those who had been convicted of a felony by any court of competent jurisdiction.

No arbitrary distinction was made. Those who by their own voluntary act had been convicted of felony and had been adjudicated of **bad moral character and as unworthy of public confidence** were simply thenceforward denied the right to practice medicine; and thus by fair and equal tests all

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persons who were permitted to practice were required to possess such **good moral character** as would justify the State in extending them the great privilege and license which they sought to enjoy.

POINT VI.

A general review of the statutes regulating the practice of medicine.

Having reviewed New York legislation, we now present at considerable length a general review of the statutes of other sovereignties regulating the practice of medicine, so far as they have reference to the qualification of **good moral character.**

These statutes, of course, widely differ in details. Many men are of many minds; and the same is true of many sovereign powers when legislating upon the same topic. There is, however, a peculiar weight of legislation in which good moral character is recognized as **essential to a physician.** The statutes which we cite comprehend a large majority of the States in the Union. They comprehend Great Britain and Ireland, and nearly all the British Colonies in North America, and take in, at a hazard, such distant regions as New Zealand, St. Lucia and Hawaii.

Indeed, it would seem that the requirement that a physician should be of good moral character was **almost a fundamental requisite** in English-speaking lands.

It will be understood that the following selections are intentionally fragmentary. Otherwise they would take up too much space. It is believed, however, that they are correct and that they will reflect intelligently the meaning of the respective legislatures.

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By way of introduction it is interesting to note that in two of the States the Constitution provides for the regulation of the practice of medicine; thus incorporating this subject into the fundamental law.

Louisiana: Cons. 1879, art 178.
Texas: Cons. 1876, art. XIV, sec. 31 in part.

We pass next to the States in which "good moral character" is simply in terms required without further elaboration:

Alabama—Code 1887, secs. 1297, 1304.
Arkansas—Act 14, 1893, sec. 2.
Kansas—Gen. Stats., 1889, sec. 2450.
Maryland—Act of 1892, chap. 296.
Massachusetts—Act 1894, chap. 459.
Ohio—S. & B.'s Rev. S. of 1890, sec. 4403.
Pennsylvania—Act May 18, 1893, sec. 13.
South Carolina—Act 1890, chap. 454, sec. 2.

Slight variations upon this general theme are found:

In Kentucky—Where the applicant must be "reputable."

In Tennessee—Where he must be "worthy and competent" (Act 1889, chap. 178, sec. 3, as amended Act 1891, chap. 109, sec. 2).

In Maine—Where he must be of "good moral character." unless he has a diploma. R. S. 1883, chap. 13, sec. 9.

In Mississippi—Where he must be of "good moral character, and state references as to his personal character." Code 1892, secs. 3244-5.

In South Dakota—Where he must be of "good moral character and not an habitual drunkard" (Act February 16. 1893, sec. 5).

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In Oklahoma—Comp. Stats. 1893, sec. 352 (same as South Dakota).

In Kansas—"Certificate * * * issued to any reputable physician who is practicing, or who desires to begin to practice, who possesses a diploma." Act 1893, Apr. 10, § 2.

Slightly more elaborate regulations are required of which the California statute is a model:

California—Certificate refused to individuals guilty of unprofessional conduct or revoked after opportunity to be heard.

Act '75-76, chap. 518, as amended Act 1877-78, chap. 576.

For provisions essentially similar to this, see:

Illinois—Laws 1887, p. 225, sec. 1.
Kansas—Act 1893, April 10, sec. 5.
Minnesota—Act 1887, chap. 9, sec. 3.
Missouri—Rev. Stats. 1889, sec. 6871.
West Virginia—Code of West Virginia, 1890, chap. 150, sec. 10.
Nebraska—Act of 1891, chap. 35, sec. 14.
Oregon—Act of February 28, 1889, sec. 9.
Montana—Act of February 28, 1889, sec. 4.
Utah—Act of 1892, chap. 72, sec. 8.
New Mexico—Comp. Laws 1884, sec. 2562.
North Carolina—Code 1883, sec. 3133.
South Dakota—Act of February 16, 1893, sec. 6.

The following statutes bring the question of moral character more specifically into view and are grouped for that reason. Particular stress is laid upon this group for the reason that it indicates the legislative

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feeling as to **the bearing of a conviction for crime upon the general question of moral character.**

Colorado—The board may refuse certificates to persons convicted of conduct of a criminal nature; and may revoke certificates for like cause. Mills, Ann. Stats., 1891, sec. 3556.

Iowa—May revoke a certificate to a person who has been convicted of felony committed in the practice of his profession, or in connection therewith; or may revoke for like cause; * * * and such refusal or revocation prohibits such person from practicing medicine, surgery or obstetrics. Laws 1889, chap. 104, sec. 7.

Louisiana—The board is required to strike from the said list (of registered names) the names of persons convicted of any infamous crimes by any court * * * whether prior or posterior to registration. Act 1882, No. 31, sec. 5.

New Jersey—May refuse or revoke a license for chronic and permanent inebriety, the practice of criminal abortion, conviction of a crime involving moral turpitude, or for publicly advertising special ability to treat or cure disease which, in the opinion of the board, it is impossible to cure (after hearing). Act 1890, chap. 190, sec. 5.

North Dakota—Substantially the same. Act 1890, chap. 93, sec. 3.

Vermont—May revoke or annul a certificate if in their judgment the holder has obtained it fraudulently or has **forfeited his right to public confidence** by the conviction of a crime. Rev. Laws 1880, sec. 3915.

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Washington—The board will refuse or revoke a license for unprofessional or dishonorable conduct subject to the right of appeal. * * * "Unprofessional or dishonorable conduct" means procuring or aiding or abetting in a criminal abortion or employing what are popularly known as cappers or steerers; or obtaining any fee on the assurance that any manifestly incurable disease can be permanently cured; or willfully betraying a professional secret; or advertisments of medical business in which untruthful or improbable statements are made; or advertising any medicine or means whereby the monthly periods of women can be regulated, or the menses reestablished if suppressed; or the conviction of any offence involving moral turpitude: or habitual intemperance. Act March 28, 1890, secs. 3 and 4.

It will be observed from the foregoing review that in the United States, by an overwhelming amount of legislation, good moral character is made essential to a physician. In an excursion now to be taken throughout the British Dominions it will be seen that England and her colonies have been even more rigid in their legislation. In fact, in the most summary fashion, bad character, whether evidenced by conviction or not, has been made the means of disqualification of a medical practitioner.

Great Britain and Ireland—If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanor, or in Scotland of any crime or offense, or shall be, after due inquiry, judged by the general council to have been guilty of infamous conduct in any professional

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respect, the general council may, if they see fit, direct the register to erase the name of such medical practitioner from the register. Acts 21 and 22 Vict., chap 90, sec. 29.

New Brunswick — Substantially same. Act 1881, chap. 19, sec 22.

Northwest Territory—Substantially same. Ord. 5. 1888, sec. 37, as substitued by Ord. 24, 1892, sec. 1.

Substantially same, Nova Scotia. R. S. 5th ser., chap. 24, sec. 19.

Manitoba—Any registered medical practitioner convicted of felony or misdemeaner before or after the passage of this act or his registration forfeits his rights to registration, and by direction of the council his name shall be erased. If a person known to have been convicted of felony or misdemeanor presents himself for registration, the register may refuse registration. If any person registered be judged after due inquiry * * * to have been guilty of infamous or unprofessional conduct in any respect, the council may direct the register to erase his name. Rev. Stats. of Manitoba, 1891, chap. 98, sec. 40.

British Columbia—Any registered practitioner convicted of any felony thereby forfeits his right to registration and * * * his name is required to be erased from the register ; or in case a person known to be convicted of felony presents himself for registration, the register has the power to refuse such registration. Cons. Act, 1888, chap. 81, sec. 32. Substantially same as to Quebec. R. S. 1888, sec. 3996.

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Ontario—A practitioner is liable to have his name erased from the register where he has been convicted before or after registration of an offence which, if committed in Canada, would be a felony or misdemeanor, or where he has been guilty of any infamous or disgraceful conduct in a professional respect. Rev. Stats. 1887, chap. 148, sec. 34.

Newfoundland—The * * * board may try and expel any member of the profession for acts of malpractice, misconduct or immoral habits * * * Act. 1893, chap. 12, sec. 32.

Prince Edward's Island—A medical practitioner guilty of infamous or disgraceful conduct in a professional respect, is liable to have his name erased, and if he apply for registration, the council may refuse it. Act 1892, chap. 42, sec. 22.

We now add some selections from the laws of New Zealand, St. Lucia and Hawaii, and leave this immediate subject. Counsel would state that the foregoing statutes do not pretend to exhaust all the statutes. For example, no examination whatever has been made of any French, Italian, German or other laws. Merely English-speaking countries have been looked into, and those not exhaustively.

There can be no question whatever as to the existence of **the fact, which it is sought hereby to prove,** namely, that English-speaking races have considered **good moral character to be an essential qualification of a physician.**

New Zealand—If any registered person shall be or shall have been convicted of any felony or misdemeanor in Great Britain or Ireland, or in any of the British Dominions, the

Register-General and Register respectively shall erase the name of any such person from the register, and such erasure shall be notified by the Register-General in the "New Zealand Gazette." Medical Practitioner's Act, 1869, No. 51.

Hawaii—It shall not be lawful for any person to practice in this kingdom as a physician or surgeon for compensation or reward unless he shall have first presented to the Board of Health satisfactory evidence of his professional qualifications and good moral char acter. Act 1876, chap. XI., sec. 3.

St. Lucia—If any registered medical practitioner is convicted of any felony, the register shall erase the name of such practitioner from the Medical Register.

If any registered medical practitioner is convicted of any misdemeanor, a report shall be submitted * * * to the Governor-in council, who * * * shall determine whether (he) has been guilty of infamous conduct in any professional or other respect, and may thereupon, if he sees fit, direct the register to erase the name * * * Medical Practitioner Ordinance, No. 77, of 1885, sec. 11.

POINT VII.

Adjudications as to good moral character.

We have reviewed in preceding points, first, the statutes of the State of New York requiring good moral character in practitioners; secondly, the statutes of other sovereignties requiring such character.

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The matter has not often been before the courts for adjudication, but in several cases they have held either directly in terms, or in general language, that the statutes regulating the practice of medicine are designed to secure good moral character.

Reference, by the way, is made to the opinions of the courts below in this case. In the Court of Appeals the opinion of Judge Haight (152 N. Y. 242) describes at lenghth the trust which is placed in a physician, and argues the necessity of good moral character.

In the prevailing opinion of Patterson, J., in the Appellate Division, it is taken for granted that the State has the right to exact good character. The Court expressly held the statute constitutional as to future felonies; and thus by necessary implication determined that good moral character is an essential qualification (see 14, App. Div. 190–1, Transcript of Record pp. 17 and 20).

In the dissenting opinion, Ingraham, J. argues strongly:

> "That the character of a physician is an important element in determining whether he possesses the necessary qualifications for the practice of his profession." (See 14 App. Div. 195; Transcript of Record p. 21).

Passing to other adjudications, we find that they flatly hold that good character is essential.

State v. State Board, 32 Minn. 324.

Per Dickinson, *J.*:

> "But the Legislature has surely the **same power** to require, as a condition of the right to practice this profession, that the practitioner

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shall be possessed of the qualifications of **honor and good moral character,** as it has to require that he shall be **learned** in the profession. It cannot be doubted that the Legislature has authority in the exercise of its general police power to make such reasonable requirements as may be calculated to bar from admission to his profession dishonorable men, whose principles or practices are such as to render them **unfit to be trusted** with the discharge of duties."

Thompson v. Hagen, 25 Maine 104.

Per Tenney, *J.:*

"—— its authors were careful that human health and life should not be exposed without some restraint, by being committed to the charge of the unprincipled and vicious. It could not have been intended that persons destitute of the **moral qualifications** required should have full opportunity to enter professionally the families of the worthy but unsuspecting and be admitted to the secrets which the sick chamber must often entrust to them."

State v. Hathaway 115 Mo. 36.

Per Gantt, *J.:*

"The Legislature then, in the interest of society and to prevent the imposition of quacks, adventurers and charlatans upon the ignorant and credulous, has the power to prescribe the qualifications of those whom the State permits to practice medicine. And the objection now made that because the law rests in this board the power to examine not only into the literary and technical acquirements of the applicant,

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but also into **his moral character,** it is a grant of judicial power, is without force."

Eastman *v.* State 109, Ind. 278.

Per Elliott, *C. J.:*

"It is, no one can doubt, of high importance to the community that health, life and limb should not be left to the treatment of ignorant pretenders and charlatans. It is within the power of the Legislature to enact such laws as will protect the people from ignorant pretenders and secure the services of **reputable,** skilled and learned men."

Within the last few days the latest decision upon this subject has been handed down by the Supreme Court of North Carolina—as recently as Dec. 23d, 1897.

State v. Call (N. Car.) 28 S. E. Rep. 517.

Per Clark, *J.:*

"To require this is an exercise of the police power for the protection of the public against incompetents and impostors, and is in no sense the creation of a monopoly of special privilege. The door stands open to all who possess the requisite age **and good character,** and can stand the examination which is exacted of all applicants alike."

This doctrine, however, seems to have been amply stated by the Supreme Court itself in the Dent case, which is made substantially the foundation stone of the entire argument.

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In that case Mr. Justice Field held that the State had the right to

> "prescribe all such regulations as, in its judgment, will secure or tend to secure (its people) against the consequences of ignorance or incapacity, as well as **deception and fraud"** (in physicians) (p. 122).

Dent v. W. Va. 129, U. S. 114,

POINT VIII.

Conviction of a felony is proof of bad moral character.

It hardly seems possible that this proposition requires argument.

Nevertheless, the Appellate Division, in reversing the conviction herein, took the position that a conviction of a felony was at best only presumptive proof of bad character.

> "Conviction of a felony certainly raises a presumption of bad character, but it is not an irrebutable presumption that a man convicted of an infamous crime, "treason, felony or the *crimen falsi*," ten or twenty or fifty years ago is to-day absolutely an immoral person, unfit to practice any profession. There is no such conclusive presumption. Even as to the competency of witnesses, the old rule of disqualification of convicts is completely done away with in the State of New York. (Code Civ. Proc. Sec. 832). The provision of the statute we are now considering does not take hold of an existing condition of moral character. That may be never so good, and yet the new crime exists, arising exclusively out of a past transgression."

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See 14 App. Div. p. 192, per Patterson, *J.*, in Transcript of Record p. 19.

The Court of Appeals in its opinion reversing this judgment, refers to this matter as follows:

> One of the conditions imposed upon persons who seek to practice medicine is that they shall possess a good moral character. (See 145). The presumption of bad character attaches to a person convicted of a felony.

See 152 N. Y. 243, per Haight, *J.*

At common law conviction of felony made a man infamous; disqualified him as a witness: excluded him from jury services;

See Amer. and Eng. Ency., Infamy, vol. 10, page 604.

worked corruption of blood and forfeiture of estates;

Bouvier Law Dict. "Felony";

forfeited all offices, at least all public offices.

Minors Insti., vol. 2, page 33.

Knowing what we do of the history of the old criminal law, we know that the convicted felon was usually quickly put to death, and thus all his rights, personal, relative, civil and political were utterly extinguished.

One hundred years ago the defendant Hawker, for the crime he has committed, would, on conviction, have been sentenced to death, and no question would ever have arisen as to whether the State had any right to deny him the further privilege of practicing medicine.

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In modern times, however, the ancient rigor of the common law has been much modified. In New York, for example, a defendant is not incompetent as a witness, although his conviction may be proved to discredit him.

Penal Code, sec. 714.

As we understand he is incompetent as a juror; he is not allowed to vote: he cannot hold any public office; he cannot engage in the liquor traffic; he is forbidden to practice medicine.

N. Y. Const., Art. 2, Sec. 2; Laws, 1896, Chap. 909, Sec. 11; Laws, 1896, Chap. 112, Sec. 23; N. Y. Mil. Code, Art. 1, Sec. 2; Laws, 1893, Chap. 661, Sec. 162; Laws, 1896, Chap. 840, Sec. 2; N. Y. Code Crim. Proced., Sec. 375.

It would doubtless be possible to write many pages upon this subject.

The general principle of law is well founded that conviction of felony stamps an individual as **thoroughly untrustworthy and as of bad moral character.**

In the analogous case of an attorney-at-law, the U. S. Supreme Court has recognized the common law doctrine that a conviction of felony makes him infamous and unfit to continue a member of the profession.

Ex parte Wall, 107 U. S. 265, 1882.

Per Bradley, *J.*:

> "If regularly convicted of a felony an attorney will be struck from the roll as of course whatever the felony may be, because he is rendered infamous. Where an attorney was convicted of theft and the crime was condoned

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by burning in the hand, he was nevertheless struck from the roll."

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"The question is," said Lord Mansfield, "whether after the conduct of this man it is proper that he should continue a member of a profession which should stand free from all suspicion. **It is not by way of punishment; but the Courts in such cases exercise their discretion, whether a man whom they have formerly admitted is a proper person to be continued on the roll or not."** (Citing 1 Tidds Prac. 89).

Similarly in Percy's case 35 N. Y. 651, the Court held that where an attorney was of bad moral character the Court had **"the power to protect the public"** by preventing him from practicing.

It is obvious that the criticism of Mr. Justice Patterson merely attacks the **propriety of the test** established by the legislature.

But in the language of the Dent case:

"The nature and extent of the qualifications required must depend **primarily upon the judgment of the State** as to their necessity."

Dent *vs.* W. Va., 129 U. S., at p. 122.

It has been repeatedly held that if the legislation is calculated, intended convenient and appropriate to accomplish the good of protecting the public health and of serving the public comfort and safety the exercise of the legislative discretion is not the subject of judicial review.

People *vs.* Gillson, 109 N. Y. 389.
People *vs.* King, 110 N. Y. 418.
People *vs.* Ewer, 141 N. Y. 129.

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People *vs.* Warden, 144 N. Y. 529.
People *vs.* Havnor, 149 N. Y. 195.

The test imposed must in its very nature be arbitrary in the sense of being fixed. The necessity of arbitrary determination of the qualification of physicians has been fully recognized and sustained.

Ex parte Spinney, 10 Nev. 323.
Hewitt *vs.* Chavier, 16 Pick. 353.
People *vs.* Philbin, 70 Mich.

See generally as to the propriety of an arbitary test.

People *vs.* Cipperly, 37 Hun, 319, dissenting opinion of Leonard, *J.*, which was adopted as the opinion of the Court of Appeals, 101 N. Y. 634.

The power of the Legislature to establish an arbitrary test has been fully justfied by this Court. Per White, *J.:*

> "It was obviously the province of the State Legislature to provide the nature and extent of the legal presumption to be deduced from a given state of facts, and the creation by law of such presumption is after all but an illustration of the power to classify."

Jones v. Brim, 165 U. S., 180 at page 183

One case, Bradwell v. State, 16 Wall, 130, is immediately pertinent: A woman was refused a license to practice law on the ground of her sex, she being otherwise qualified.

Per Bradley, *J.:*

> "It is true that many women are unmarried and not affected by any of the duties, complications and incapacities arising out of the married state, but these are **exceptions to the gen-**

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eral rule. The paramount destiny and mission of women are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

* * *

In the nature of things it is not every citizen of every age, sex and condition that is qualified for every calling and position. It is **the prerogative of the legislator** to prescribe regulations founded on nature, reason and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State; and, in my opinion, in view of the peculiar characteristics, destiny and mission of women, it is within the province of the Legislature to ordain what offices, positions and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that the decision and firmness which are presumed to predominate in the sterner sex."

This Bradwell case was followed and approved. *In re* Lockwood, 154 U. S. 116.

The New York Legislature, within this Bradwell case, has merely recognized a fact which centuries of **"nature, reason and experience"** had determined—namely, that the conviction of a felony deprives the convict of the right to public confidence. It would seem, therefore, that their act in denying to such persons the right to practice medicine, instead of being an arbitrary, unsustainable proceeding, was the exercise of a wise discrimination in the matter of law making.

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POINT IX.

A physician's right to practice is a mere license; analogy of a druggist's, an attorney's, and a liquor license.

We have the weight of Judge Cooley's eminent authority to the effect that a practitioner of medicine is merely a licensee:

> "And some employments in which integrity is of vital importace it may be proper to treat as privileges merely, and to refuse the license to follow them to any who are **not reputable**" (referring to the practice of medicine as one of these employments).

Cooley's Cons. Lim., 6th ed., p. 745.

This proposition that the physician is a **licensee** is taken for granted in all the cases in which the right of the State to regulate the practice has been sustained.

The position taken by this court in the Dent case is inconsistent with any other theory.

> "**No one has a right to practice medicine** without having the necessary qualifications of learning and skill; and the statute only requires that whoever assumes, by offering his services as a physician, that he possess such learning and skill" (p. 123).

Dent v. W. Va., 129, U. S., 114.

No question relating to character was then before the court, and hence that qualification was not touched upon.

The law of taxation, however, throws a clear light upon the subject. The practice of medicine

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has been subject to an occupation tax (Am. and Eng. Encly. Taxation, vol. 25, page 486).

See also Ohio v. Proudfit, 3 Ohio, 63, when a **license tax** on a physician was sustained without opinion, and likewise a license tax on an attorney (Ohio v. Hibbard, 3 Ohio, 63).

Afterwards, and in Ohio v. Gazley, 5 Ohio 14, the court was asked to reconsider its decision in the Hibbard and Proudfit cases, but declined.

In describing the physician's (as well as the lawyer's) status, they said:

Per Lane, *J*:

> It is said a license to practice is a contract, and that a tax upon such as are licensed is a violation of the contract. **We cannot consider the license in this light.** Although the effect of the license gives to the members of these professions something of an exclusive character, and incidentally confers valuable privileges, yet the design of the license is to protect the community from the consequences of a want of professional qualifications, and to benefit the public by enabling the profession to acquire professional merits, consequently the **license cannot be holden to confer any vested privileges, but is liable to be modified in any manner which the public welfare may demand.**

The position of a druggist is plainly similar to that of a physician in the relation borne to the police power.

In the case of a druggist this Court has recently held that his license is subject to modification, and

that if his license is modified by general law he cannot be heard to complain.

Gray v. Conn., 159 U. S. 76.

The position of an attorney-at-law is precisely analogous

Bradwell *vs.* State, 16 Wall, 130, and see the license tax cases.
Simmons *vs.* State, 12 Mo. 268.
Young *vs.* Thomas, 17 Fla. 169.
Languille *vs.* State, 4 Tex. App., 312.
Ohio *vs.* Hibbard, 3 Ohio, 63.
Ohio *vs.* Gazlay, 5 Ohio, 14.

In the similar case of a liquor dealer, whose right is a license from the State, an interesting Court of Appeals case is immediately in point and shows the inalienable right of the State to control the privilege.

Board of Excise Commissioners *vs.* Barrie, 34 N. Y., 657.

Per Wright, *J.:*

> "A State is not sovereign without the power to regulate all its internal commerce as well as police. The Legislature exercises and wields these sovereign police powers as it deems the public good to require.
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> * * * * * *
>
> It, in terms, it is true, **revokes licenses** granted under the Act of 1857, but that is **no encroachment** upon any right secured to the citizen as inviolable by the fundamental law. These licenses to sell liquors are **not contracts** between the State and the persons licensed, giving the latter vested rights, protected, on

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> general principles, and by the Constitution of the United States, against subsequent legislation: nor are they property, in any legal or constitutional sense. **They have neither the qualities of a contract or of property but are merely temporary permits to do what otherwise would be an offense against a general law.** They form a portion of the internal police system of the State; are issued in the exercise of its police powers, and are subject to the direction of the State Government, which may modify, revoke or continue them as it may deem fit."

It thus appears that the relation of a physician to his sovereignty is that of **licensee and licensor.** If this is not the relation, then it is obvious that the whole possibility of police control over the practice of medicine disappears instantaneously.

In the case of the control of liquor traffic the State has the right to stop it altogether, for thereby the public good may be consulted. In the case of the regulation of medicine, however, no such absurd regulation could be made, nor is it at all necessary that the control over such callings should comprehend the power of destroying it.

It must follow, however, that if **an individual practitioner** is deficient in the matter either of learning **or of proper character,** then the power of the State is sufficient to disqualify him from practicing for the general good.

There is a vast and obvious distinction between the power to stop an unfit individual and the power to prohibit the entire practice.

One would be reasonable; the other would be unreasonable.

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POINT X.

The exaction of a new requirement as to character in physicians deprives Hawker of no vested right.

We would preface this point by noting that the argument now proceeds upon the following assumptions:

1. That good moral character is a proper requisite in physicians.

2. That conviction of felony is a sufficient test of good moral character.

3. That a physician's status is that of a license.

The essential character of a license is that of a permit to do what otherwise would be an offence against the general law. Regarding, then, a physician's status as that of a licensee it is obvious that there is no distinction between the granting of a license in the first instance and its subsequent control by the Legislature for the general good.

Thus, in the case of a **physician,** it was held that his license was not property in such a sense that it could not be revoked for bad character; that the original right to grant and the reserved right to revoke, stand on the same footing.

> State (Chapman) v. State Board, 34 Minn., 387.

Relator claimed that his license when once granted, was **property** (389). That it could not be revoked by an executive board:

Per Mitchell, *J.:*

> "There is no possible distinction in this respect between refusing to grant a license and

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revoking one already granted. **Both acts are an exercise of the police power.** The power exercised and the object of its exercise is in each case identical, viz.: **to exclude an incompetent or unworthy person** from this employment. Therefore, the same body which may be vested with the power to grant, or refuse to grant, a license, may also be vested with the power to revoke." (390.)

The **Dent** case, which has been so often and so extensively quoted, fully establishes this doctrine, viz.: That by the imposition of new conditions the Legislature has the power **to destroy an existing license and oust an existing practitioner,** just as Dent himself was ousted.

In a recent decision this Court has re-affirmed this doctrine most luminously.

By a Connecticut statute, previous to 1890, a druggist could obtain a license to sell liquor in a certain way; but, by Sections 3087 and 3067, Conn. Rev. Stats., passed in 1890, an additional requirement was made.

The druggist, Gray, persisted under his original license and did not comply with the new conditions. He was convicted and carried his case to the Supreme Court of the United States.

The Court decided the case in a brief opinion, citing nothing. It is patent that this decision is on all fours with the **Dent** case, and proceeds upon precisely the **same theory.**

Gray v. Connecticut, 159 U. S. 76-77.

Per Field, *J.*:

"A license to pursue any business or occupation from the governing authority of any municipality or State, can only be invoked for

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the protection of one in the pursuit of such business or occupation, so long as the same continues unaffected by existing or new conditions.

* * * * * *

The responsibility of the legal authority, municipal or state, cannot be stipulated or bartered away. Whatever provisions were prescribed by the law previous to 1890, in the use of spirituous liquors in the medicinal preparations of pharmacists, they did not prevent the **subsequent exaction of further conditions,** which the lawful authority might deem necessary or useful.

For reasons which were deemed sufficient after 1890 by the authorities of Connecticut, the use of spirituous liquors in the preparation of pharmacists' compounds required still **further provisions than those previously existing."**

The right to stop an attorney for bad moral character is put on the **same ground.**

Percy's Case, 36 N. Y. 651.

Per Grover, *J.:*

"It had been seen that the right of admission to practice is made, both by the constitution and statute, to depend upon the possession of a **good moral character,** joined with the requisite learning and ability. It is equally important that this character should be preserved, after admission, while in the practice of the profession, as that it should exist at the time. It would be an anomaly in the law to make good moral character a prerequisite to an office

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of a life tenure, while no provision for removal is made in case such a character is wholly lost (p. 654)."

The authorities are uniform in holding that legitimate exercise of the police power **deprives a person of nothing.**

Mugler *vs.* Kansas, 123 U. S., 643.

Here, by an act of Kansas in 1881, the liquor traffic was absolutely forbidden, and all buildings where liquors were manufactured, sold, etc., were declared to be **common nuisances,** and were directed to be abated.

Per Harlan, *J.:*

"The buildings and machinery constituting these breweries are of little value if not used for the purpose of manufacturing beer; that is to say, if the statutes are enforced against the defendants, the value of their property will be very materially diminished" (p. 657).

* * * "The acknowledged police power of a State extends often to the **destruction of property.** A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed" (p. 658).

* * * * * *

"Power to determine such questions so as to bind all must exist somewhere, else society will be at the mercy of the few who, regarding only their own appetites or passions, may be willing to imperil the peace or security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the Government" (pp. 660–661).

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"It is true that when the defendants in these cases purchased or erected their breweries the laws of the State did not forbid the manufacture of intoxicating liquors. But the State **did not thereby give any assurance** or come under an obligation **that its legislation upon that subject would remain unchanged"** (669, citing Stone vs. Miss., 101 U. S., 816).

"If the public safety or the public morals require, the hand of the Legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer" (p. 670, citing Beer Co. vs. Mass., 97 U. S., 32).

"We are unable to perceive anything in these regulations inconsistent with the constitutional guaranties of liberty and property. The State having the power to prohibit the manufacture and sale of intoxicating liquors for other than medical, scientific and mechanical purposes, we do not doubt her power to declare that any place kept and maintained for the illegal manufacture and sale of such liquors shall be deemed a common nuisance, and shall be abated, and at the same time to provide for the indictment and trial of the offender. One is a proceeding against the property used for forbidden purposes, while the other is for the punishment of the offender" (p. 671).

The rule is thus stated in a most recent case.

Per Harlan, *J.:*

"Uncompensated obedience to a regulation enacted for the public safety under the police

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power of the State is not taking or damaging without just compensation of private property, or of private property affected with a public interest."

Chicago. Burlington & R'd. v. Chicago, 166 U. S., 226 at page 225 (citing many cases).

Health Department vs. Rector, etc. 145 N. Y., 32.

Under section 663, New York Consolidated Act, certain improvements were directed to be made in tenement-houses. Certain penalties were sued for against Trinity Church, the owner of **existing tenements,** for failure to make them comply with the provisions of the law.

Per Peckham, *J.* (after generally discussing the police power):

"Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. * * * If [the defendant] suffer injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure (p. 43).

"Instances are numerous of the passage of laws which entail expense on the part of those who must comply with them and where such expense must be borne by them without any hearing or compensation because of the provisions of the law (27 Vt., 140). One of the late instances of this kind of legislation is to be

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found in the law regulating manufacturing establishments (Laws 87, chap. 462). The provisions of that act could not be carried out without the expenditure of a considerable sum by the owners of a then existing factory. Hand rails to stairs, hoisting-shafts to be enclosed, automatic doors to elevators, automatic shifters for throwing off belts or pulleys, and fire-escapes on the outside of certain factories—all of these were required by the Legislature from such owner and without any direct compensation to him for such expenditure. **Has the Legislature no right to enact laws such as this statute regarding factories unless limited to factories to be thereafter built?** Because the factory was already built when the act was passed, was it beyond the legislative power to provide such safeguards to life and health as against all owners of such property unless upon the condition that these expenditures to be incurred should ultimately come out of the public purse? **I think to so hold would be to run counter to the general course of decisions regarding the validity of laws of this character and to mistake the foundations upon which they are placed"** (pp. 43–44).

The last sentence of this opinion is borne out in an interesting fashion by the celebrated case of Munn *v.* Illinois, 94 U. S., 113, in which the right to fix the charges of grain elevators was determined. There Mr. Chief Justice Waite used the words:

> "The same principle applies to them that does to the proprietor of a hackney-carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses

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and carriage and established his business **before** statute or the ordinance was adopted" (at p. 133)

We may also add the interesting case of Brick Church vs. N. Y., City, 5 Cow., 538.

Here New York City deeded to the Brick Church a piece of land for a burying ground with a covenant of quiet enjoyment.

Afterward, by an order of the Board of Health, it forbade interments.

The Church claimed that the order of the Board of Health impaired the obligation of a contract (*i.e.*, the covenant of quiet enjoyment).

Held, that the City could not so contract as to divest itself of its governmental power of preserving the public health.

It is a well accepted doctrine that no law is *ex post facto* which merely changes the remedy.

Note the reason, because the remedy is something:

"In which no one can be said to have a **vested right** and which the State, upon grounds of public policy, may regulate at pleasure.

Gibson v. Miss., 162, N. Y., 565, at p. 590.

This proposition, that there is **no vested right** in a remedy, has been stated even more suggestively by this Court by Mr. Chief Justice Waite in the case of Munn *v.* Illinois, 94 U. S., 113, where he broadly states that nobody has any vested right **in a rule of law.** That is precisely what the State of New York contends for in this Hawker case:

"But a mere common-law regulation of trade or business may be changed by statute. A person has no property, **no vested interest in**

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any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the Legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

"We know that this is a power which may be abused, but that is no argument against its existence."

Munn *v.* Illinois, 94 U. S., at p. 134.

The only way in which the defendant Hawker, under authority of the Cummings and Garland cases, can claim that he has sustained an additional punishment by reason of the operation of the New York statute is upon the theory that some **vested right** has been taken away from him.

Otherwise he is deprived of nothing. If such privilege as he had was enjoyed subject to the police power of the State, it follows logically that a modification or destruction of his privilege within the police power deprives him of nothing. That is the doctrine of the **Mugler** just quoted, and at this late day admits of no doubt.

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Perhaps the most beautiful illustration of this doctrine is in the recent case of Douglass v. Kentucky, 168 U. S., which has been handed down since the first argument of this case, upon Nov. 10, 1896.

In this **Douglass** case the plaintiff in error claimed that under a certain Kentucky charter a vested right to conduct a lottery was created, and that a subsequent statute which destroyed the right, thereby attacked vested rights of property and impaired the obligation of a contract.

By reason of its importance we note the case at length.

Douglas v. Comm. of Kentucky, 168 U. S., 488, s. c. 18. Sup. C. Rep., 199.

Per Harlan, *J.*—

> "Is a State forbidden by the supreme law of the land from protecting its people at all times from practices which it conceives to be attended by such ruinous results? Can the Legislature of a State contract away its power to establish such regulations as are reasonably necessary from time to time to protect the public morals against the evils of lotteries?
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> * * * * * *
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> These questions arose and were determined, upon much consideration, in Stone v. Mississippi, 101 U. S., 814, 819, 821.
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> No Legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature

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and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of a power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself."

Again, referring to lotteries: "They disturb the checks and balances of a well-ordered community. Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what, 'by casting of lots, or by lot, change, or otherwise,' might be 'awarded' to them from the accumulation of others. Certainly the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion. Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in the sovereign capacity, and through their properly constituted agencies, **may resume it at any time** when the public good shall require, whether it be paid for or not. All that one can get by such a charter is suspension of governmental rights in his favor, subject to withdrawal at will, He has, in legal effect, **nothing more than a license** to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the State. It is a permit, good as against the existing laws, but subject to future legislative and constitutional control or withdrawal."

Upon this general subject it is of peculiar interest to note that in the case of Calder *v.* Bull, 3 Dal.

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386, the great *ex post facto* case, Chase, *J.*, states that the resolution and decision complained of were not *ex post facto*, because

> "they took away no right of property vested in Calder and wife" (p 394).

This apparently insignificant phrase is most pregnant in view of the claim advanced by counsel—namely, that the New York statute in question takes away **no vested right** from Hawker. It would, therefore, seem to settle the question that the law, as to him, is not *ex post facto*.

These cases all show that when the State licensed the defendant Hawker to practice medicine, it did not and could not deed away **its power** and duty **to control or stop** his practice, if by such control or stopping it was essential to protect the interest of the people.

Hawker acquired **no vested right** to practice. He did not become sovereign over the State. It remained still sovereign over him.

If the State took away the right, in the exercise of its police power, **it deprived him of nothing.**

As this inconvenience constituted, in the theory of law, no deprivation of any vested right, it is preposterous to claim that **any new punishment** was added for any previous offence.

POINT XI.

The ex post facto clause of the Constitution does not restrain the legitimate exercise of the police power.

This topic is so extensive that counsel has considered it wise, under the circumstances, to embody it in a separate brief. Much collateral matter would

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be involved, and thereby the continuity of the main argument would be impaired.

POINT XII.

Cases analogous to the Hawker case.

The right of the State of New York to deny to Hawker a future privilege upon the ground that his unfitness has been proved by his past conduct is abundantly justified by the following cases.

They expressly establish the proposition that **a law denying such a privilege** upon the ground of past conduct is **not obnoxious,** either as *ex post facto* or as in the nature of a bill of pains and penalties.

One of these cases was decided by the Supreme Court of the United States.

In each of these cases **the past offense** was of such a character as to render the person **unfit to enjoy the privileges** desired. It was therefore held that the disqualification was **not additional punishment** for the past offense, but was merely the denial of a right to a person who by reason of his status was not fit to enjoy the right. In every case it was declared that the law involved **could not be considered ex post facto.**

Murphy vs. Ramsey, 114 U. S. 15.
(five cases decided together).

An Act of Congress of March 22, 1882, abridged the right of electors in the Territories under previous laws by denying to bigamists any further right to vote.

It was claimed that this law was **ex post facto as to those who were already bigamists.**

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Held, the law was **not ex post facto,** but was valid.

Per Matthews, *J.:*

> "It is argued that * * * to do so would give the statue a retrospective effect, and by thus depriving citizens of civil rights, merely on account of **past offenses,** or on account of acts which when committed were not offenses, would make it an **ex post facto** law, and therefore void (p. 40).
>
> * * * * * *
>
> It is **not because** the person has committed the offense * * * and as an additional punishment for its commission that he is disfranchised (p. 42).
>
> * * * * * *
>
> Upon this construction the statute is **not open to the objection** that it is an *ex post facto* law. **It does not seek** * * * **to operate as a punishment upon any offense at all.** The disfranchisement operates upon the existing state and condition of the person and **not upon a past offense.** He alone is deprived of his vote who, when he offers to register, is then in the state or condition of a bigamist (pp. 42, 43).
>
> * * * * * *
>
> It is precisely similar to an inquiry into the fact of nativity, of age, or of **any other status** made necessary by law as a condition of the elective franchise (p. 43).
>
> It rests with Congress to say whether, in a given case, any of the people resident in the

Territory shall participate in the election of its officers or the making of its laws; and it may therefore take away from them any right of suffrage it may previously have conferred, or at any time modify or abridge it as it may deem expedient" (p. 44).

Washington vs. State, 75 Ala., 582 (1884), s. c. 51 Am. Rep. 479.

Indictment for voting **after conviction of a felony.** Convicted in 1871. The disqualification was caused by Constitution of 1875.

Per Somerville, *J.:*

"It is quite common, also, to deny the right of suffrage * * * to such as have been **convicted of infamous crimes.** The manifest purpose is to preserve the purity of the ballot-box. * * * The presumption is that one rendered infamous by conviction of felony or other base offense, indicative of great moral turpitude is **unfit** to exercise the privilege of suffrage. * * * It is proper, therefore, that this class should be denied a right, the exercise of which might sometimes hazard the welfare of communities. * * * The exclusion must, for this reason, be adjudged **a disqualification, imposed for protection and not for punishment** * * * withholding an honorable privilege, and not denying a personal right or attribute of personal liberty. * * *

The clause of the Constitution * * * cannot, for the foregoing reasons, be considered as either an **ex post facto** law * * * or as in the nature of a bill of attainder. * * * It neither takes away any legal right nor imposes any legal burden.

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(Distinguishing Cummings' case, 4 Wall, 277, and Garland case, 4 Wall, 333).

Foster vs. Police Commissioners, 102 Cal., 483 (May, 1894).

Held: That a retrospective ordinance **depriving** persons of the right to a liquor license who have been **convicted of felony,** or who have carried on the business of selling liquors in places of amusement where females were employed, is **not an ex post facto law,** but simply **furnishes a standard** applicable to all persons by which their **fitness** to conduct a business, in itself dangerous to the morals and good order of the city, shall be measured.

Per Haynes, *C.:*

> Though not an *ex post facto* law, it is retrospective in so far as it determines from the **past conduct** of the party **his fitness** for the proposed business. Felons are also excluded from obtaining such a license, **not as an additional punishment,** but because the **conviction of a felony is evidence of the unfitness** of such persons as a class; nor can we perceive why such evidence should be more conclusive of unfitness were the act done after the passage of the ordinance than if done before.

United States vs. Chew Cheong, 61 Fed. Rep., 200 (April, 1894).

Here a Chinaman had been **convicted of a felony. Afterward** by law his right to take out a certificate to prevent his deportation was denied, for the law did not permit such certificates to be taken out by persons convicted of felony.

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It was claimed the law was **ex post facto** as to him.

Held per Morrow, *J.:*

The law was not *ex post facto;* for the government had the inalienable right to expel all aliens; and **to select criminals** for deportation was the exercise of a **just discrimination in the administration of the laws and a wise authority in preserving the institutions of the country."**

(Cites nothing.)

POINT XIII.

Certain arguments of the defendant answered.

First.

Defendant claims that the Dent case, 129 U. S., 114, only allows the State to impose

> "such qualifications as are attainable by **reasonable study or application."**

Whereas Hawker **can never undo** the fact that he is a convict.

This misstates the Dent case seriously. The Court, speaking of valid requirements, says:

> "It is only when they have **no relation to such calling or profession,** or are unattainable by reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation" (p. 122).

As good moral character is a recognizedly proper qualification of a physician, "it bears a relation to

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such calling or profession," within the doctrine of the Dent case. By requiring it, the State protects its people

> "against the consequences * * * of **deception and fraud**" (Dent case, p. 122).

Therefore if Hawker's bad character is so adjudicated that it cannot be rehabilitated, that is **all the more reason** why he should be excluded from the practice.

The whole question turns upon the reasonableness of the regulation, not its possibility or impossibility.

Many conditions may be impossible to a given individual. The President of the United States must be a native American. Every naturalized citizen is therefore excluded. With but little exception only men can vote. All women are therefore excluded. Policemen and soldiers must be of a certain height and weight. All undersized persons are excluded.

It may be utterly impossible for a given individual to come up to a given requirement, yet the requirement may be reasonable to impose.

The State of New York now requires a certain **moral stature** in practitioners of medicine. Hawker does not attain that stature. But this circumstance does not even tend to show that the requirement of a moral stature is unreasonable.

It may be added, however, that it is **not impossible** to undo the fact that he is an ex-convict. He might possibly get a pardon which would restore his rights.

Ex-parte Garland, 4 Wall, 333.

It is believed that this argument of the defendant involves a *reductio ad absurdum*.

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If, as to Hawker, the present qualification is unattainable, he has only himself to blame, for by his own vile act he put himself in this position. He cannot now be heard to qualify his own wrong and claim that **by his own wrongdoing** he has estopped the State of New York from making him a proper subject of regulation.

This argument is somewhat similar to the argument in a French murder case which counsel once read. The defendant therein was on trial for having killed his father and his mother. His advocate appealed to the Court for consideration for his client upon the ground that he was **a poor orphan.**

Second.

His counsel admits that

> No doubt the Legislature intended only to insure the good moral character of practitioners,

and that

> It is not denied that the law under which this indictment is found might be good if it is construed prospectively, *i. e.*, as to felonies committed after its passage.

If the power of regulation is admitted at all, it must comprise **all practitioners, future or present.** Otherwise counsel "mistake the foundation upon which the law is placed."

> Health Dept. *vs.* Rector, 145 N, Y., at p. 44.

Third.

He claims that his right was taken away without complaint, examination, witnesses, trial, judge or

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jury ; that he is made to be a witness against himself, etc., etc., etc.

Such a "formidable arraignment" was attempted in Mugler *vs.* Kansas, 123 U. S., 643, at page 672, where the Court brushed it aside almost contemptuously.

The obvious answer is that he had **no vested right** to continue his practice.

For his **voluntary offense** in continuing to practice after his license to do so was abrogated, he was tried with every safeguard which the Constitution guaranteed him.

Fourth.

Defendant claims

> that when the statute authorized the Medical College to give him his diploma, it clothed him with the right to practice medicine.

If this means anything, it means that the State bartered or sold or deeded away its police power. This is not reasonable. It has been held over and over that by no such act can the sovereign power disable itself.

> Brick Church v. N. Y. City, 5 Cow., 538.
> Mugler v. Kansas, 123 U. S., 643.
> Gray v. Conn, 129 U. S., 74.
> Douglass v. Kentucky, 168 U. S.

Fifth.

Defendant claims

> that when he had served his term for his original felony, the State could not again take his original offense into account in considering his fitness.

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That the State is bound by its contracts as to punishment, even with criminals.

The bare statement of these propositions is ample to prove their absurdity.

Carried to their logical conclusion they would erect ex-convcts into a **privileged class.** They would be made sovereign over the State; the preposterous proposition would follow that when fitness was to be taken into account, their **admitted and adjudicated unfitness** could not be considered.

The felon's brand would take on a new significance.

In the language of Justice Grier, they would have

"A vested right to do wrong."

Freeborn v. Smith, 2 Wall., 160, 175.

It is enough to add that this claim of the defendant, if followed by the Court, would necessitate the overruling of the carefully considered cases of Murphy vs. Ramsay, 114 U. S., 15, Washington vs. State, 75 Ala., 582; Foster vs. Police Commrs., 102 Cal., 483, and U. S. vs. Chew Cheong, 61 F. R., 200.

These are the cases that hold that **past conviction** may be taken as proof of **present unfitness,** and were quoted, *supra* **Point.**

POINT IV.

The Act to be presumed constitutional: Its harshness no argument.

It is believed that enough has been shown in the foregoing pages to make it plain that the Legislature

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of the State of New York has the right to control the practice of medicine as a matter of law, and to make it also plain that the requirement of good moral character is reasonable as a matter of fact.

It is not for the people to show that this statute is constitutional. The *onus* is on the defendant to make it plain that the statute is unconstitutional, as exceeding the power of the Legislature.

This proposition may be dismissed by a mere reference to the words of Chief Justice Marshall:

> "The question whether a law be void for its repugnance to the constitution is at all times a question of much delicacy which ought seldom, if ever, be decided in the affirmative in a doubtful case. The Court when impelled by duty to render such a judgment would be unworthy of its station should it be unmindful of the solemn obligation which that station imposes, but it is not upon slight implication that the Legislature is to be pronounced to have transcended its powers, and its acts be considered as void. The opposition between the Constitution and the laws should be such that the Judge feels a clear and strong conviction of their incompatibility with each other."
>
> Fletcher vs. Peck, 6 Cranch., 87, at p. 128.

As bearing upon the intention of the Legislature to protect the public health, and as negativing any conclusion that it was the object of the Legislature to punish the defendant, Hawker, it is enough to call attention to the character of the act now before the Court.

This act is Chapter 25 of the General Laws, entitled **"The Public Health Law."**

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It applies to all manner of subjects. Without going into particulars, its various articles are as follows:

Article 1. State board of health.
" 2. Local boards of health.
" 3. Adulterations.
" 4. Tuberculosis and glanders.
" 5. Potable waters.
" 6. Quarantine at the port of New York.
" 7. The health officer of the port of New York.
" 8. Practice of medicine.
" 9. Practice of dentistry.
" 10. Veterinary medicine and surgery.
" 11. Pharmacy.
" 12. Miscellaneous provisions.

The regulation of the practice of medicine is only one feature of this great act, and the incidental disqualification of convicted felons **is but a single phrase of a single article.** The general purpose of the Legislature to protect the Public Health is, therefore, abundantly established.

Assuming that there were any doubt as to the purpose of the Legislature, that doubt must be resolved in favor of the act.

People v. Warden, 144 N. Y. 529.
Soon Hing v. Crowley, 113 U. S. 703.
Sweet v. Rechel, 159 U. S. 380.

If the laws enacted by a State be within the sphere of the legislative power, * * * the harshness, injustice and oppressive character of such laws will not invalidate them as affecting life, liberty or property without due process of law, * * * The remedy for evils of that character is to be sought from State legislatures.

Ry. Co. v. Humes, 115 U. S., 512, 520.

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POINT IV.

The question is one of sovereignty.

In the language of Chief-Justice Marshall:

"The question is in truth **a question of supremacy**" (4 Wheat, 433).

Either Hawker is sovereign over the State of New York or the State of New York is sovereign over Hawker.

If the contention of the defendant was sustained, then, in the language of the Court of Appeals, the State of New York

"would not be sovereign."

34 N. Y., 657.

And in the language of the same case, the defendant's contention

"challenges legislative authority exercised since the origin of the Government."

Any claim that by reason of an existing diploma the defendant Hawker was beyond the power of the State of New York, acting for the public benefit, to control or stop his practice, amounts simply to an argument that the police power which granted Hawker his right is without force to control that right should circumstances require its future control. This would practically involve **overruling** the doctrines laid down by the Court of Appeals and the United States Supreme Court, which we have so fully cited, namely:

Health Department vs. Rector, 145 N. Y., 32.

Mugler vs. Kansas, 123 U. S., 643.

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Board of Excise vs. Barry, 34 N. Y., 667.
Dent vs. West Virginia, 129 U. S., 114.
Gray vs. Conn., 159 U. S., 74.

These cases are all leading, and are merely typical of many others which guarantee the right of the sovereignty in the exercise of its police poper to impose such **new conditions** by way of regulation as the public benefit demands ; and make the Legislature (within the scope of its power) the sole judge of the necessity.

It is even a more serious proposition, but one which seems unanswerable, that the contention of Hawker would **absolutely overrule** the four cases, namely:

Murphy vs. Ramsey (and four other cases), 114 U. S., 15.
Washington vs. State, 75 Alabama?
U. S. vs. Chew Chong, 61 Fed. Rep. 200.
Foster vs. Police Commissioners, 102 Cal., 482.

In these four cases the **precise doctrine** was laid down which is contended for here—namely, that by reason of the conviction of a felony a person's character might thereby be deemed bad, and for that reason the Legislature might deny him privileges which it was within the power of the Legislature to control.

These cases recognize the doctrine that such control **does not have as its object additional punishment** for the unfortunate individual, but could have as its object **the protection of the public** against persons manifestly unfit.

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CONCLUSION.

If the defendant Hawker's contention were adopted by this Court, it would follow that the sovereign power of the State to regulate the practice of medicine would be denied in the very respect in which it is most essential.

Those who, by reason of actual past conviction, were **most unfit** would be beyond control.

But these are the very people over whom control is most essential.

To control such—

> "is the exercise of a **just discrimination** in the administration of the laws and a wise authority."
>
> U. S. vs. Chew Cheong, 61 Fed. Rep. 200.

It is believed that the two great requisites of a physician are—

I.—**A technical education,** and

II.—**A good moral character.**

An overwhelming and imposing array of statutes and decisions shows that this is the common understanding of English speaking peoples.

The **Dent** case, 129 U. S. 114, has established beyond question the right of the State to determine educational qualifications of physicians, and the coexisting right of the State to alter those qualifications and **to exclude existing practitioners** who do not comply with new conditions imposed for the protection of the public.

It is hoped that the event of this prosecution will be to supplement and round out the doctrine of the

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Dent case, by establishing the proposition that the power of the State is co-extensive when the qualification of **good moral character** is involved.

It is hoped that it will be held that the State of New York has the right to protect its people against practice by ex-convicts, and that it will be held that **the exclusion of an ex convict is a mere regulation of the police power.**

It is hoped that the Court will, in the language of Ex parte Wall, 107 U. S. 265, say that this disqualification is **in no sense a punishment**, but is a step for the protection of the public.

It is hoped that the Court will hold that Hawker's license is not such a vested right as to be beyond the constitutional power of the State of New York to disqualify him if he cannot comply with new regulations as to moral character established for the public protection.

It is hoped that the **Cummings** and **Garland** cases will be distinguished here, as they were distinguished in the *Dent* case, as

(1) **Aimed at past acts.**

(2) **Designed to punish.**

(3) Calling for qualifications which had **no connection** with the professions.

It is hoped that this Court will hold that it is the intention of the New York statute

> "to secure such (**good moral character**) in the profession of medicine that the community might **trust with confidence those receiving a license under the authority of the State.**"
>
> (Dent case, 129 U. S., at 128).

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As a means of strengthening the hands of those who are attempting to enforce the Medical Law, it is hoped that the result of this appeal will be the promulgation by the Court of an opinion in which the true status of a physician will be broadly and fundamentally determined. It is hoped that the Court will lay down the principle that **the relation of the State and a physician is that of licenser and licensee;** and for that reason the State has the power to control, modify or abridge the privileges of the physician-licensee by reasonable general regulations, affecting either technical education or good moral character; and that, for the protection of the public, the State has the power to require practitioners to possess qualifications either of education or of character, even if **existing practitioners** who do not possess such qualifications have to be thereby **excluded from practice.**

It is apparent that if the State has not the power to protect the public by denying to persons of bad character the right to practice medicine, then and in that event its control of the practice will be more apparent than real.

The judgment of the Court of Appeals of the State of New York should be affirmed.

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